IN THE HIGH COURT OF JUDIATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.4925 OF 1989

1. Parvatibai Mahadeo Pawar
age 60, Mukkam Bawada,
Tal.Khandala, Dist. Satara ..
2. Baburao Sakharam Pawar
age 62, Bawada, Tal.Khandala
Dist. Satara ..
3. Tatyaba Sakharam Pawar
aged 55, At Bawada,
Tal.Khandala, Dist.Satara .. Petitioners.

Vs.

1. Dinkar Ganpati Pawar
aged 60, residing at Bawada,
Tal.Khandala, Dist.Satara ..
2. Rajaram Sakharam Pawar
aged 45, At Market Committee
Yard, Lonand, Tal.Khandala
Dist. Satara ..
3. Yamuna Abasaheb Bhosale
aged 30, Shivaji Nagar,
Tal.Khandala, Dist.Satara ..
4. Pradeep Mahadeo Pawar
aged 28, At Kirloskar Karkhana,
Hadapsar, Pune .. Respondents.

Mr.N.V.Walawalkar for the petitioners.
Mr.G.R.Rege for the respondents.

CORAM : D.B.BHOSALE, J.

DATED : 21ST SEPTEMBER, 2004

ORAL JUDGMENT:

1. By means of this writ petition, the petitioners-defendants have impugned the order dated 22.9.1989 passed by the Civil Judge, Junior

Division, Khandala in their application Exhibit-45 filed in Regular Civil Suit No.107 of 1987. The application Exhibit-45 was filed for framing of two issues relating to their claim of tenancy set up in paragraph nos.4 and 5 of the written statement and for making reference thereof under section 85A of the Bombay Tenancy and Agricultural Lands Act, 1948 (for short "the Act") has been rejected.

2. The factual matrix that would be relevant and material for deciding the questions involved in the instant petition, in brief, is as follows: Respondent No.1 filed Regular Civil Suit No.107 of 1987 for declaration that the Will of deceased-Geetabai dated 9.4.1979 is not binding on his share in the properties in question, bearing Gat No.1850 admeasuring 23 Ares with a right attached to it to draw water from Gat No.1847 and house No.421 and for injunction restraining the petitioners and respondent nos.2 to 4 from interfering with his alleged possession of north one-half share in the said properties. He also prayed for decree of possession if it was found on evidence that he was not in possession of the said property. Respondent No.1 set out geneology of his family - Bapuji was propositus who had three sons,

namely, Sakharam, Keru and Ganapati. Keru died in 1918 and was survived by his wife - Geetabai, who died on 29.3.1987. Sakharam had four sons who are defendant nos.1 to 4 in the said suit. Respondent No.1 is the son of Ganpati. The case set up by respondent no.1 in the suit is that in the year 1929 Sakharam effected partition of the joint family properties between himself and his brother Ganpati and started enjoying their respective shares separately by excluding the properties which were partitioned and set apart the suit property for the purpose of providing maintenance to Geetabai. The land given to Geetabai was cultivated throughout her life, by Sakharam and Ganpati till they died, and thereafter, by their children, the petitioners and respondents herein. He further averred that the petitioners and respondent nos.2 to 4 had, on 9.4.1979 got executed by Geetabai, a Will by taking undue advantage of her ignorance and illness and which Will was, therefore, liable to be declared illegal.

2.1 The petitioners resisted the suit by filing written statement in which they claim tenancy in the suit property. The petitioners, therefore, filed application Exhibit-45 in the said suit and

prayed for framing of the following issues relating to the claim of the tenancy set up in paragraphs 4 and 5 of the written statement and for an order referring the said issues to the tenancy authorities for decision under section 85A of the Act:

> "(1) Whether defendant nos.1A to 1C and 3 and 4 prove that the deceased father of defendant nos.3 and 4 was tenant in the suit property on 1.4.1957 ?
>
> (2) Whether the present defendants are deemed purchasers under the provisions of 32F and 32P of the B.T.A.L. Act ?"

2.2 The application Exhibit-45 was opposed by respondent no.1. The said application was ultimately rejected by the Civil Judge by his order dated 22.9.1989 observing that the main point which was to be decided in the said suit is whether or not the Will executed by the said Geetabai was a valid one or not, and hence, it was not necessary to raise the issue of tenancy in the present case. The relevant observations in the impugned order read thus:

> "It is to be noted that in the instant case, the controversial point which is to be decided is whether or not the will executed by Gitabai was legal or not. The proprietory rights of the parties will have to be investigated in this case. I do not think that the issue of tenancy is essential in this case. The deft. No.1 has to establish in proprietory rights by establishing the Will executed by Gitabai. The real controversy is in respect of Will. Under such circumstances, I do not think it necessary to frame the issue of tenancy in this case. The application is therefore liable to be dismissed. In the result, I pass the following order".

3. Mr.Walawalkar, learned counsel for the petitioners, at the outset, submitted that the learned Judge committed grave error in holding that the issue of tenancy is not essential in the instant case. According to Mr.Walawalkar, the petitioners claim tenancy in the suit property and in view thereof even if the suit is decreed in favour of respondent no.1 the possession of the

petitioners cannot be disturbed or the prayer in the suit seeking possession of the lands in question cannot be granted. He invited my attention to the averments in paragraphs 4 and 5 of the written statement to contend that they are sufficient to frame issues as prayed for. In short, according to Mr.Walawalkar, the averments in the written statement are not vague and they give all particulars which are sufficient enough to frame the issue of tenancy and refer the same to the tenancy authorities.

3.1 On the other hand Mr.Rege, learned counsel for the respondent contended that the averments relating to claim of tenancy are vague. They do not give particulars such as the time when the tenancy was created, the person by whom it was created and the terms on which it was created and in view thereof framing of the issues as prayed for by the petitioners is not necessary. He took me through the pleadings and in support of the contentions urged by him placed reliance on the judgments of this court in **Pandu Dhondi Yerudkar and Anr. Vs. Ananda Krishna Patil AIR 1975 BOMBAY 52, Uttam Sambha Deshmukh and Others Vs. Yamunabai w/o Chandrabhan Bhoyar and Others 1998 (2) Mh.L.J.**

144, M/s.Nilesh Construction Company and Anr. V. Mrs.Gangubai and Others AIR 1982 BOMBAY 491, Rama Hariba Khavale Vs. Gopika Ramling Survase & Ors. 2003(4) ALL MR 554, Mansing Bajirao Sawant V. Waman Laxman Sawant 1995(1) Bom.C.R. 645.

4. I perused all the aforestated judgments cited by Mr.Rege, learned counsel for the petitioner. In **Pandu Dhondi Yerudkar's** case (supra) this court after considernig the pleadings observed that when a vague plea is made by the defendant contending that he is a tenant of the land, the Court should hesitate to frame such an issue on such a vague plea, unless the defendant is able to give particulars showing the time when the tenancy was created, the person by whom it was created and the terms on which it was created. If in spite of such particulars being asked for the defendant is unable to furnish the same, the Court should not raise an issue on a vague plea that the defendant, is a tenant of any part of the suit land. This court has reiterated the aforestated proposition of law in **M/s.Nilesh Construction Co.'s** case (supra). In this case the judgment in **Pandu Dhondi Yerudkar's** case (supra) was considered by this court. The same principle has been reiterated

by this court in **Mansing Bajirao Sawant's** case (supra), **Uttam Sambha's** case (supra) and **Rama Hariba Khavale's** case (supra).

5. Keeping in view the law laid down in the series of the judgments by this court I examined the issue involved in the instant petition. Before I consider the pleadings I would like to comment on the impugned order by which the application filed by the petitioners has been rejected. It is apparent that the learned Judge did not examine the pleadings of the parties. He seems to have taken into account the relief claimed by the plaintiff to hold that the framing of an issue of tenancy is not essential in this case. The learned Judge ought to have appreciated the prayers in the suit against the claim of the petitioners that they are tenants in the land in question and considered that even if the suit is decreed, whether the possession as prayed for could be restored to respondent no.1. The learned Judge failed to appreciate that even if the respondent succeeded in proving that the Will was illegal and not binding on him, the petitioners and respondent nos.2 to 4 could legitimately claim the said property on the basis of their tenancy rights, which was independent of the respondents'

right, which they were claiming on the basis of the said Will. It is clear that if the issue of tenancy is answered in favour of the petitioners, respondent no.1 would not be entitled to seek possession even if the suit is decreed and, therefore, in my opinion, framing of the issue was essential. The learned Judge, therefore, ought to have examined the pleadings to find out whether there exists sufficient material on record to frame the issue. Since the trial court failed to undertake that exercise, instead of remanding the matter to the trial court, I examined the pleadings and other material placed on record to find out whether the said issues need to be referred under section 85A of the Act.

6. The petitioners, in the written statement, have specifically denied that the suit properties were excluded from the partition. They averred that Sakharam was cultivating the lands mentioned in paragraph 1-A of the plaint as a tenant of deceased - Geetabai and that respondent no.1 had been away from Khandala, at his maternal grant father’s place at Jawale and was not concerned with the family affairs, as alleged. It is further mentioned that in the year 1963 when respondent

no.1 had tried to set up a claim in respect of the suit property, the proceedings of Takrar Register were commenced and it was held therein that the suit property was allotted to Geetabai on ownership basis. The petitioners have further mentioned that the proceedings in relation to Ferfar No.785 was decided in favour of the petitioners by Tahsildar, by its order dated 22.7.1987. A specific reference was also made to the proceedings under section 32G initiated for fixation of the price of the said land in favour of Sakharam, father of petitioner nos.2 and 3, and that it was dropped because deceased - Geetabai was a widow. A perusal of form No.6 of the revenue record vide entry No.1066 supports the said contention urged in the written statement. Moreover, 7 X 12 extracts produced on record prima facie support the averments in paragraph 4 and 5 of the written statement that the petitioners were tenants in the suit land. It has been mentioned in paragraph 4 that Sakharam was cultivating the suit land as the tenant of Geetabai on crop share basis. Considering the averments in paragraph 4 of the written statement and the mutation entry No.1066 dated 6.8.1966 and 7 X 12 extracts right from the year 1954-55, in my opinion, they are sufficient and clear to frame the

issue of tenancy and refer the same to the tenancy authorities under section 85A of the Act. The averments made in the written statement and documents in support thereof produced on record cannot be termed as vague. The judgments relied upon by Mr.Rege, learned counsel for the respondent would not apply to the facts of the present case. In so far as the second issue, namely, "Whether the present defendants are deemed purchasers under the provisions of 32F and 32P of the B.T.A.L. Act" is concerned Mr.Walawalkar, learned counsel for the petitioners stated that the said issue need not be framed. In the circumstances this petition is allowed. The trial court is directed to frame the first issue and refer the same to the tenancy authorities expeditiously. The suit is pending since 1987, and in view thereof the tenancy authorities are directed to expedite the hearing of the reference. Needless to mention that if the tenancy authorities, ultimately, answer the issue in favour of the petitioners may proceed to pass consequential orders as may be necessary in the interest of justice and to avoid multiplicity of the proceedings. Rule is, accordingly, made absolute. No costs.

(D.B. Bhosale, J.)

HIGH COURT AT BOMBAY
CIVIL APPELLATE SIDE

WRIT PETITION NO.4925 OF 1989

Date of Decision: 21st September, 2004

For approval and signature:

The Hon'ble Mr. Justice : D. B. BHOSALE

1. Whether Reporters of Local papers may be allowed to see the judgement ?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950, or any Order made thereunder?

5. Whether it is to be circulated to the Civil Judges?

6. Whether the case involves an important question of law and whether a copy of the judgment should be sent to Nagpur Office?